Supreme Court, U. S.
FILED
FEB 26 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1183

HAROLD P. ROBB, M.D., Individually and by His Successor in Office, C. DUANE HENSLEY, Ph.D., Director of the Department of Mental Health, and PATRICK J. GANNON, M.D., Individually and by His Successor in Office, SADASHIV D. PARWATIKAR, M.D., Superintendent, St. Louis State Hospital,

Petitioners,

vs.

RICHARD KENNEDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions, Statutes and Administrative Regulations Involved—

- Constitution of the United States 4
- United States Code 4
- Missouri Revised Statutes 5
- Rules and Regulations, Personnel Advisory Board, State of Missouri 8

Statement of Case 15

Reasons for Granting Writ—

The Decision Below Conflicts With Controlling Opinions of This Court and Interferes With a State's Right Under the Tenth Amendment to Govern Its Own Employer-Employee Relationships 19

A. The Decision Conflicts With the Holding of This Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) 20

B. The Decision Below Failed to Follow the Teachings of This Court in *Bishop* v. *Wood*, ... U.S. ....., 48 L.Ed.2d 684, 44 U.S.L.W. 4820 (June 10, 1976), and *National League of Cities* v. *Usery*, ... U.S. ....., 49 L.Ed.2d 245 (June 24, 1976) 23

Conclusion 27

Appendix—

Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit A1

Order Denying Respondent's Petition for Rehearing A15

Order Denying Petitioners' Petition for Rehearing A16

Judgment and Orders of the United States District Court for the Eastern District of Missouri A17-A21

Letter of Dismissal A22

Table of Citations

Cases

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 20, 21, 22, 25, 27

Bishop v. *Wood*, ... U.S. ....., 48 L.Ed.2d 684, 44 U.S. L.W. 4820 (June 10, 1976) 22, 23, 25, 27

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 20, 21, 24

Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961) 22

Fahey v. *Mallonee*, 332 U.S. 245 (1947) 21

Goss v. *Lopez*, 419 U.S. 565 (1975) 25

National League of Cities v. *Usery*, ... U.S. ....., 49 L.Ed.2d 245 (June 24, 1976) 23, 24

Paul v. *Davis*, 424 U.S. 693 (March 23, 1976) 25

Quinn v. *Muscare*, 425 U.S. 560 (May 3, 1976) 19

Tennessee v. *Dunlop*, ... U.S. ....., 48 L.Ed.2d 660, 44 U.S.L.W. 4811 (June 10, 1976) 20

Thurston v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976), cert. pending, No. 76-5224 22

Wilderman v. *Nelson*, 467 F.2d 1173 (8th Cir. 1972) 24

Wolf v. *Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. Banc 1974) 17

Statutes

Mo. Rev. Stat. Chapter 36, §§150, 370, 380, 390 .....5, 6, 7, 8, 16, 22, 26

Mo. Rev. Stat. §§536.100-536.140 17

Mo. Supreme Court Rule 100 17

Mo. Constitution, Article V, §22 17

42 U.S.C. §§1983, 1985 .....4, 17

U.S. Constitution, Amendments V, X, XIV 4, 24

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

HAROLD P. ROBB, M.D., Individually and by His Successor in Office, C. DUANE HENSLEY, Ph.D., Director of the Department of Mental Health, and PATRICK J. GANNON, M.D., Individually and by His Successor in Office, SADASHIV D. PARWATIKAR, M.D., Superintendent, St. Louis State Hospital,

Petitioners,

vs.

RICHARD KENNEDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Harold P. Robb, M.D., individually and by his successor in office, C. Duane Hensley, Ph.D., Director of the Department of Mental Health, and Patrick J. Gannon, M.D., individually and by his successor in office, Sadashiv D. Parwatikar, M.D., Superintendent, St. Louis State Hospital, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 30, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto, pp. A1-A14. The judgments and opinions of the United States District Court for the Eastern District of Missouri, which are unreported, appear in the appendix, pp. A17-A21.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 30, 1976. Respondent filed a timely petition for rehearing, with suggestions that the rehearing be heard en banc. This petition was denied on January 21, 1977. Petitioners filed a timely petition for rehearing, with suggestions that the petition be reheard en banc or in the alternative that the questions presented be certified to the United States Supreme Court. This petition was denied on January 24, 1977. On February 2, 1977, the Court of Appeals denied petitioners' application for stay of the mandate pending the filing of this petition. The mandate issued to the District Court on February 2, 1977. The Honorable Justice Blackmun denied petitioners' application for stay presented to him on February 10, 1977.

This petition for certiorari was filed within ninety days of the date that the Court of Appeals denied petitioners' petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), §2101(c) and under Supreme Court Rule 19.

QUESTIONS PRESENTED

1. May a state or other public governmental employer, at the same time it confers upon an employee an expectation that suspension or dismissal from employment will only be for cause, prescribe the procedural means by which an employee may be suspended or dismissed and the procedural means by which it may be determined whether the suspension or dismissal was proper?

2. May a state or other public governmental employer adopt a system which is similar to common practice in private industry, namely the right of the employer to suspend or to dismiss an employee at any time subject to the employee's right of reinstatement and an award of full back pay if it is subsequently determined that the suspension or dismissal was unjustified?

3. Or, is a state required under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to not only provide an employee a full and fair post-termination evidentiary hearing before an impartial tribunal, but also provide and follow certain pre-termination procedures in addition to a post-termination hearing—namely, advance notice, an opportunity to rebut the charges in writing, and an opportunity for oral conference with the decision maker?

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitution of United States

Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law; . . ."

Amendment X:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Amendment XIV:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Title 42, §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Missouri Revised Statutes

Chapter 36, §150, subsection 1: (Revised Statutes of Missouri, Cumulative Supplement 1975, p. 78)

> "Every appointment or promotion to a position covered by this law shall be made on the basis of merit determined by such person's eligibility rating established by competive examinations. Demotions in and dismissals from employment shall be made for cause under rules and regulations uniformly applicable to all positions of employment. No appointment, promotion, demotion or dismissal shall be made because of favoritism, prejudice or discrimination. The regulations shall prohibit discrimination in other phases of employment and personnel administration, and shall provide such remedy as is required by federal merit system standards for grant-in-aid programs and is not provided in Chapter 296, RSMo."

Chapter 36, §370, subsection 1: (Revised Statutes of Missouri, Cumulative Supplement 1975, p. 80)

> "An appointing authority may, for disciplinary purposes, suspend without pay any employee in his division for such length of time as he considers appropriate, not exceeding twenty calendar days in any twelve-month period. In case of a suspension, the director shall be furnished with a statement in writing specifically setting forth the reasons for such suspension. Upon request, a copy of such statement shall be furnished to such employee. With the approval of the director, any employee may be suspended for a longer period pending the investigation or trial of any charges against him. Any regular employee who is suspended for more than three days shall have

the right to appeal to the board as provided under section 36.390."

Chapter 36, §380: (Revised Statutes of Missouri, Cumulative Supplement 1975, p. 80)

"An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth the reason therefor and files a copy of such statement with the director. If the director determines that the statement of reasons for the dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the character or conduct of the employee, he may, upon request of the employee, approve reemployment under subsection 7 of section 36.240, in any class in which the employee has held regular status. Any regular employee who is dismissed shall have the right to appeal to the board as provided under section 36.390."

Chapter 36, §390, subsection 5: (Revised Statutes of Missouri, Cumulative Supplement 1975, p. 81)

"Any regular employee who is dismissed or demoted or suspended for more than three days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion the board shall approve or disapprove such action, and in the event of a disapproval the board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal the board shall approve or disapprove such action and may make any one of the following appropriate orders:

(1) Order the reinstatement of the employee to his former position and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal;

(2) Sustain the dismissal of such employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal;

(3) Except as provided above the board may sustain the dismissal, but may order the director to recognize reemployment rights for the dismissed employees under subsection 7 of section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service."

Chapter 36, §390, subsection 6: (Revised Statutes of Missouri, Cumulative Supplement 1975, p. 81)

"The board shall establish such rules as may be necessary to give effect to the provisions of this section. The rules may provide that the board or the chairman of the board may delegate responsibility for the conduct of investigations and the hearing of appeals provided under any section of this law to a member of the board or to a hearing officer designated by the board. Such hearing officer shall have the power to administer oaths, subpoena witnesses, compel the production of records pertinent to any hearing, and take any action in connection with such hearing which the board itself is authorized to take by law other than making the final decision and appropriate order. When the hearing has been completed, the individual board member or the hearing officer who conducted the hearing shall prepare a summary thereof and recommend a findings of fact, conclusions of law, decision and appropriate order for approval of the board. The board may adopt such recommendations in whole or in part, require the production of additional testimony, reassign the case for rehearing, or may itself conduct such new or additional hearing as is deemed necessary prior to rendering a final decision."

Rules and Regulations, Personnel Advisory Board, State of Missouri

Rule 13.2—CAUSES FOR SUSPENSION, DEMOTION AND REMOVAL

"The following are declared to be causes for suspension, demotion, or removal of any employee in the classified service; however, such actions may be based

upon causes other than those herein enumerated, namely, that the employee:

(a) Has willfully violated any of the provisions of the 'State Merit System Law' or the rules of the Personnel Advisory Board made in pursuance thereof;

(b) Is incompetent or inefficient in the performance of the duties of his position (specific instances to be charged);

(c) Has been wantonly careless or negligent in the care of the property of the State;

(d) Has been guilty of abusive or improper treatment toward an inmate or patient of any state institution or to a person in custody; provided the acts committed were not necessarily or lawfully committed in self-defense, to protect the lives of others or to prevent the escape of anyone lawfully in custody;

(e) Has some permanent or chronic physical or mental ailment or defect which incapacitates him for the proper performance of the duties of his position;

(f) Has been habitually tardy in reporting for duty or has absented himself frequently from duty during regular working hours;

(g) Has been convicted of a felony, or of a misdemeanor involving moral turpitude;

(h) Has been guilty of a scandalous and disgraceful conduct while on or off duty where such conduct tends to bring the state service into public disrepute."

Rule 14.3—GUIDE FOR CONDUCT OF HEARINGS OF DISCIPLINARY APPEALS BEFORE THE MISSOURI PERSONNEL ADVISORY BOARD

"(a) APPEALS PROCEDURE

(1) The Personnel Director, upon receipt of a written request from an employee for an appeal, will mail to the Appellant a form on which he should carefully state his contentions. This form should be returned to the Personnel Director as soon as possible, but in any event within 30 days after the effective date of the disciplinary action. A copy of the disciplinary notice from the Appointing Authority will be furnished the Appellant and if the appeal is accepted, a copy of the Appellant's contentions set out in his appeal will be furnished the Appointing Authority.

(2) The Appellant may represent himself and handle his own case but shall have the right to be represented by a duly licensed Attorney. A party to an appeal cannot be represented by anyone other than a duly licensed Attorney (Sec. 484.010, RSMo.) except that the Appointing Authority may appear by an employee in his agency. If either party intends to employ and be represented by an Attorney, he shall promptly notify the Personnel Director of the name and address of such Attorney.

(3) If either party to an appeal desires the issuance of a Subpoena for any witness or records at any hearing he must apply for it

in writing at least five (5) days before the date of the hearing, giving the name and address of the witness, together with a statement of what he intends to prove by such witness, or records. The Personnel Director or Personnel Advisory Board issues the Subpoena by request, but the service of the Subpoena rests in the hands of the party requesting it. Service of the Subpoena is to be effected in accordance with Chapter 491.110 to 491.130, RSMo.

(4) Upon the acceptance of an appeal, the Appellant and Appointing Authority, or their representatives, may meet with the Personnel Director, acting for the Personnel Advisory Board, at a time and place set by the Director for a pre-hearing conference to determine the facts at issue. At the pre-hearing conference both parties may stipulate on mutually agreed matters relevant to the disciplinary action or the appeal may be resolved by agreement of the parties. If, during the pre-hearing conference, the case is not resolved and the appeal goes forward to a hearing before the Personnel Advisory Board, the Board will confine the hearing to the law and facts at issue as stipulated by mutual agreement of the parties to the appeal.

(5) All motions or other pleadings by the parties shall be submitted in writing with a copy served or mailed to the opposing party. A party to an appeal may amend his pleading as a matter of course at any time before

a responsive pleading is filed and served, or, if the pleading is one to which no responsive pleading is required and the action has not been set for hearing he may so amend it at any time within 30 days after it is filed. Otherwise, a party may amend his pleading only by leave of the Personnel Advisory Board or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Personnel Advisory Board otherwise orders.

(b) HEARINGS PROCEDURE:

(1) Hearings before the Personnel Advisory Board will be held in the Office of the Personnel Division in Jefferson City, Missouri.

(2) If no pre-hearing conference has been held, the Personnel Advisory Board will make a determination of what questions are at issue based upon the notice of disciplinary action and the Appellant's contentions in his appeal prior to the taking of testimony. The hearing shall be confined to and come within the scope of law and facts that the Board has determined to be at issue. The Board may exclude evidence which is purely cumulative.

(3) The Board requires attendance at the hearing of the appeal of the person who imposed

the discipline. If that person is not the Appointing Authority it must be the subordinate to whom authority has been delegated.

(4) The Chairman of the Personnel Advisory Board will read a statement citing the appropriate Sections of the Merit System Law applicable to appeals.

(5) The Chairman of the Personnel Advisory Board will read the charges of the Appointing Authority and the contentions of the Appellant. By agreement those documents may be inserted in the record without reading before commencing the taking of testimony.

(6) All witnesses will stand and be sworn.

(7) The Personnel Advisory Board, on request of either party or on its own motion, may order that the witnesses be separated so as to preclude any witness, other than the parties and their Attorneys, from hearing the testimony of other witnesses. In the application of this rule only one person, in addition to Counsel, shall represent the Appointing Authority.

(8) The Appointing Authority will be required to present his case first. Experience has shown this method gives the Personnel Advisory Board a clearer and quicker picture of the issues. This is not a shift of the burden of proof, but is only the burden of going ahead with the proof.

(9) The Personnel Advisory Board may take notice of the Rules and Regulations, the class

specifications, and the Pay Plan without the necessity of an offer in evidence.

(10) The Personnel Advisory Board may fix the total time to be allowed for oral argument.

(11) At the request and expense of any party or parties, the Personnel Division will cause the proceedings to be recorded and preserved.

(12) No rehearing shall be granted from a final decision of the Personnel Advisory Board.

(13) An appeal set for hearing may be continued:

(a) By the Personnel Advisory Board or Personnel Director for cause deemed sufficient;

(b) By consent of both parties to the appeal;

(c) If the hearing is not reached it shall be reset and given precedence over any subsequent appeal.

No continuance will be granted except for compelling cause or to serve the ends of justice. If an Appellant requests and is granted a continuance, the Personnel Advisory Board may, in its discretion, deny him any compensation for that portion of time lost by reason of the continuance made at his request if his appeal is finally sustained.

(14) The finding of the Board will be announced in writing subsequent to the hearing. Each party will be notified by letter sent to him by Certified Mail. The finding will be made as provided in Sec. 36.390(5), RSMo. 1959.

(15) As appropriate and where no specific rule governs the issue, the Personnel Advisory Board will utilize the rules of the Civil Procedure for guidelines."

STATEMENT OF CASE

This case involves important policy questions as to what procedures are required by the due process clause of the Fourteenth Amendment before a state or other public employer can suspend or dismiss any of its civil service system employees. Also at issue is the more fundamental question of what extent the federal courts are going to become involved in, review, and regulate the personnel relationship of a state or other public employer with its employees.

Richard Kennedy, respondent, at the time of his dismissal had been employed by the state at the St. Louis State Hospital, a facility for the care and treatment of the mentally ill, as the Workshop Director of the Work Therapy Program. The terms of his employment were governed by the provisions of Chapter 36, RSMo, the state merit (civil service) system act. He was initially employed by the state in December, 1968, as an industrial therapist and received subsequent promotions until he obtained the position of workshop director. He was subsequently suspended on June 17, 1975, and dismissed from his position effective June 24, 1975.

Under the provisions of Chapter 36, a merit (civil service) system employee serves a six month probationary period which can be extended for an additional six months. During this probationary period, an employee can be dismissed at any time, without notice, and without cause.

Once an employee successfully completes his probationary period, he becomes a "regular" employee subject to the substantive and procedural protections as are provided by Chapter 36, RSMo. A regular employee can be suspended or dismissed only for cause under rules and regulations adopted by the State Personnel Advisory Board uniformly applicable to all positions of employment (§§36.150, 36.370, and 36.380, RSMo Cum. Supp. 1975; and Rule 13.2 of the Rules and Regulations of the Personnel Advisory Board). A regular employee who is suspended for more than three days or who is dismissed has the right of an appeal to the Personnel Advisory Board provided such appeal is filed within thirty days. (See §36.390, RSMo Cum. Supp. 1975; Rule 14.3.) The statute provides that an employee who is dismissed is entitled to advance notice of the reasons for such action prior to the effective date.

The Personnel Advisory Board is an administrative agency composed of three individuals appointed by the Governor, confirmed by the Senate, and not subject to the control of any individual who has the authority to suspend or dismiss an employee. The appealing employee is entitled to an evidentiary hearing either before the Board or a hearing officer, the right to be represented by counsel, the right to call witnesses on his own behalf, and the right to cross examine the witnesses who testify against him (§36.390(5), RSMo Cum. Supp. 1975). Subsequently, the Board is required by Missouri law to issue a decision with written findings of fact and conclusions of law. If the Board determines that the dismissal or suspension was not justified, it has the right to order reinstatement including an award of full back pay for the salary lost. Section 36.390(5), RSMo. In calculating the award of back pay, the Board is required to set off the wages or salaries which the employee earned in the

interim. But from this set off, the employee is entitled to subtract his attorney's fees and expenses. See *Wolf v. Missouri State Training School for Boys*, 517 S.W.2d 138, 147-148 (Mo. Banc 1974). Finally, there is the right of judicial review in the Missouri courts to review the decision of the Board. See §§536.100-536.140, RSMo; Missouri Supreme Court Rule 100; and Article V, §22, Missouri Constitution.

The suspension and dismissal of Richard Kennedy from his position of employment at St. Louis State Hospital complied *in toto* with state merit (civil service) system law. He was personally served prior to the effective date of the dismissal a seven page letter specifying in detail the reasons for such action (Appendix, pp. A22-A33). In the same letter he was advised of his right to appeal this action to the Personnel Advisory Board. He requested and was immediately provided copies of the rules and regulations of the Board which spell out the procedures in order to perfect an appeal and the rules governing the hearing (affidavit and exhibits of Patrick J. Gannon, Superintendent).

Rather than pursuing his administrative remedies as provided by Missouri law, respondent elected to and filed, one day after the effective date of his dismissal, a complaint in the United States District Court for the Eastern District of Missouri alleging that the reasons for his dismissal were false, and without basis in law or in fact. He further contended that the dismissal violated his rights to procedural due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that he should have been granted a full pre-termination evidentiary hearing or at the very minimum advance notice and an opportunity to respond and to rebut the charges in writing. Jurisdiction was based upon 42 U.S.C. §§1983, 1985, and 28 U.S.C. §§1343, 1331, 1651, 2201 and 2202.

Named as defendants were Patrick J. Gannon, individually, and in his official capacity as superintendent of St. Louis State Hospital, and Harold P. Robb, M.D., individually and in his official capacity as the Director of the Missouri Department of Mental Health.

On February 12, 1976, the District Court, ruling on cross motions for summary judgment, held that petitioners did not violate respondent's constitutional rights and that the procedures employed in dismissing him accorded him procedural due process. There was no adjudication as to whether respondent's dismissal was justified. However, had respondent chosen to appeal to the Missouri Personnel Advisory Board as provided by Missouri law, this issue already would have been resolved. But he chose not to do so until the time had expired.

Respondent timely appealed to the Eighth Circuit Court of Appeals. The Court of Appeals reversed and ordered reinstatement unless the state accords him certain pre-termination risk of error minimizing procedures and further accords him another opportunity to appeal to the Personnel Advisory Board (Appendix p. A14). Without so expressly holding, the court below has implicitly held the Missouri civil service system, Chapter 36, is unconstitutional. The opinion holds that due process requires certain pre-termination safeguards to minimize the risk of error in addition to a full post-evidentiary hearing. These pre-termination safeguards are: advance notice of the proposed action, the statement of the charges and reasons, a reasonable opportunity to submit written material in rebuttal, and finally an opportunity for an oral appearance before the decision maker, all prior to the effective date of any suspension or dismissal. Basically, the Eighth Circuit is now imposing on the State of Missouri the procedures which were prescribed by Congress when it enacted the federal Civil Service System.

REASONS FOR GRANTING WRIT

The Decision Below Conflicts With Controlling Opinions of This Court and Interferes With a State's Right Under the Tenth Amendment to Govern Its Own Employer-Employee Relationships.

Far more is involved here than the narrow issue of whether respondent's dismissal was justified and whether he should be reinstated to his position of employment. Rather, the case involves important policy questions as to what procedures must be followed by a state or other public body before a civil service system employee can be suspended or dismissed. Also involved is a more fundamental question as to what extent federal courts are going to review personnel decisions by public bodies and interject themselves into and regulate personnel relationships of the state with its employees.

Here, the court below has stated that the procedures established by the Missouri General Assembly when it created the expectation of continued employment for state employees do not provide sufficient protection against "ill founded" decisions. In effect, the court has declared the Missouri civil service system unconstitutional. And, as a "super legislature", the court has judicially rewritten Missouri's civil service system act. The issues presented will have serious impact not only on this state but on every other governmental body.

In *Quinn* v. *Muscare,* 425 U.S. 560 (May 3, 1976), this Court apparently considered the question of a pre-termination versus post-termination hearing for public employees of such importance that it granted certiorari. The writ was subsequently dismissed as being improvidently granted when the Civil Service System regulations under

attack were modified to provide a pre-termination evidentiary hearing.

A.

The Decision Conflicts With the Holding of This Court in Arnett v. Kennedy, 416 U.S. 134 (1974) and Board of Regents v. Roth, 408 U.S. 564 (1972).

The court below has misconstrued and misinterpreted the nature of respondent's expectation of continued government employment. His expectation existed not in the abstract but in the context of the remedies established in the same law creating his expectation and establishing the procedures by which he could be suspended or dismissed. *Arnett* v. *Kennedy, l.c.* 152. In *Board of Regents* v. *Roth, supra, l.c.* 573, this Court held "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and *their dimensions defined* by existing rules or understandings that stem from an independent source such as state law. . . ." Cf. *Tennessee* v. *Dunlop*, ... U.S. ....., 48 L.Ed.2d 660, 44 U.S.L.W. 4811 (June 10, 1976). Concededly, a merit system employee can only be dismissed for cause. But such employee does not have an expectation of continuing employment until it is first proved that there is in fact cause. Rather, he serves at the pleasure of his employer subject to a right of reinstatement and back pay if it is later determined after an evidentiary hearing that the suspension or dismissal was not justified.

The effect of the decision below is to expand and enlarge upon respondent's expectations of continued employment which were established by state law and did not exist when he accepted employment. The crucial question becomes whether a state or congress in creating a civil service system can at the same time establish the

procedures governing removal? Or will the federal courts, once tenure has been created, establish for the states and Congress the procedures which must be followed?

Justice Rehnquist in speaking for the plurality of the members of this Court clearly resolved that question in favor of placing the power in the legislative branch by stating:

> ". . . [W]e *hold that the Lloyd-La Follette Act, in at once conferring upon nonprobationary federal employees the right not to be discharged except for 'cause' and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations.* We also conclude that the post-termination hearing procedures provided by the Civil Service Commission and the OEO adequately protect those federal employees' liberty interest, recognized in *Roth, supra,* in not being wrongfully stigmatized by untrue and unsupported administrative charges. . . ." *Arnett* v. *Kennedy,* 416 U.S. *l.c.* 163, 40 L.Ed.2d 38-39; Emphasis supplied.

Again, in *Board of Regents* v. *Roth* this Court very explicitly noted that the creation and dimensions of property rights can and are to be creatures of state law.

Respondent's position in this litigation is both perplexing and illogical. On one hand he is claiming the benefits of the state civil service system; yet on the other he is challenging the sufficiency of the procedural and substantive rights it confers. Cf. *Arnett* v. *Kennedy, l.c.* 153; *Fahey* v. *Mallonee,* 332 U.S. 245 (1947). Had it not been

for the substantive and procedural guarantees provided in Chapter 36, RSMo, respondent would have had no right to an evidentiary hearing any time even if the stated reasons for his discharge were false. *Bishop* v. *Wood*, ... U.S. ....., 48 L.Ed.2d 684, 44 U.S.L.W. 4820 (June 10, 1976).

The court below clearly conflicts with the plurality opinion in *Arnett*. Even though a majority of the court was unable to agree on any particular rationale, it is clear that a majority has held that due process does not require a pre-termination hearing and that a post-termination hearing is sufficient to clear the stigma which would be attached to an unjustified dismissal. There is no decision of this Court requiring the pre-termination "safeguards" now called for by the court below. In fact, petitioners have found only one court decision which imposes these requirements. *Thurston* v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976), cert. pending, No. 76-5224. The pre-termination procedures present in *Arnett* were not mandated by this court. Rather, they were established by Congress when they "fettered" the otherwise unlimited right of the Executive Branch to hire, suspend, or discharge employees at will. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Bishop* v. *Wood, supra*.

As a result of the court's holding, the public employer is relegated to one of two extremes in its personnel practices. No tenure whatsoever or a tenure system with a full and post-termination hearing, but also pre-termination procedures.

But, the system presently provided for by state law is similar to the common practice which exists in private industry. The employee can be discharged at any time, but can subsequently be reinstated with full back pay if it is later determined through union grievance proce-

dures or court proceedings such as under the Civil Rights Act or the National Labor Relations Act that the suspension or dismissal was improper. A public employer should be no different than a private employer.

B.

The Decision Below Failed to Follow the Teachings of This Court in Bishop v. Wood, ... U.S. ....., 48 L.Ed.2d 684, 44 U.S.L.W. 4820 (June 10, 1976), and National League of Cities v. Usery, ... U.S. ....., 49 L.Ed.2d 245 (June 24, 1976).

The rationale behind the court's opinion was to establish procedures to minimize the "risk of error" of an inappropriate or unjustified suspension or dismissal. But in *Bishop* v. *Wood, supra,* Justice Stevens on behalf of this Court commented with respect to the role of the federal judiciary and the function of the Fourteenth Amendment in personnel decisions stating:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. *We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill advised personnel decisions.*" (..... U.S. ....., 48 L.Ed.2d *l.c.* 693; Emphasis supplied)

In Footnote 14, Justice Stevens stated that the ultimate control of state personnel relationships is and will remain with the states. States have the unfettered discretion to grant or withhold tenure at will. He noted that the instances in which federal courts have required pre-termination hearings is extremely rare since there is no federal

common law of property rights nor does every discharge implicate a constitutionally protected liberty interest.

There, as here, Justice Stevens assumed that the reasons for Bishop's dismissal were false and unfounded. But, because he served at the will of the city, even though he had passed his probationary period, was a permanent employee, and could be dismissed "if he failed to perform up to the standards of the classification held or continues to be negligent, inefficient, or unfit to perform his duties . . .", he has no job expectation whatsoever and no rights to a hearing at any time even if the reasons for his dismissal are false.

In the recent decision of *National League of Cities* v. *Usery, supra,* this Court clearly established that Congress under the Commerce Clause could not regulate the states' employer-employee relationships such as wages, hours, and terms of compensation for overtime. The Court indicated that such were attributes of a state's sovereignty guaranteed to the states to control under the Tenth Amendment. Likewise, we submit that the extent which a state grants tenure to its employees is a matter which rests solely within the state's power. As noted previously in *Board of Regents* v. *Roth, supra,* property interests under the Fourteenth Amendment are not created in the Constitution but are created and their dimensions defined by state law. Here, the court below in the guise of constitutional interpretation has expanded and enlarged upon respondent's expectation of continued employment. In so doing it has infringed upon the state's prerogative as granted to them by the Tenth Amendment.

The court below in holding that due process requires certain procedures to "minimize the risk of error" relied upon one of its own earlier decisions, *Wilderman* v. *Nelson,* 467 F.2d 1173 (8th Cir. 1972) in which they held that

dismissal requires a *pre-termination* evidentiary hearing. The validity of that holding is now suspect in light of this Court's intervening decisions in *Bishop* v. *Wood, supra,* and *Paul* v. *Davis,* 424 U.S. 693 (March 23, 1976). There, this Court held that there was no violation of a person's constitutional rights when public officials circulated a list describing an individual as a "known shoplifter".

The court below also relied upon this Court's holding in *Goss* v. *Lopez,* 419 U.S. 565 (1975), in which this Court held that before a public school could expel or suspend a student he had to be given notice and an opportunity to rebut the charges. However, this Court did not require a full evidentiary hearing.

Here, an employee has a right to a full evidentiary hearing to clear his name and to determine whether the action was proper. Furthermore, the interests at stake between expelling or suspending a student and suspending or dismissing an employee are totally different. Justice Powell observed in *Arnett*:

> "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." (*l.c.* 169)

The procedures now called for by the opinion below will only be time consuming and interfere with the state's ability to have a competent and effective body of employees. The effect on morale to have an employee who

should be suspended or dismissed continuing on the job is obvious. Nor, should the state be required to suspend with pay pending these procedures since that would only deplete the already overburdened state treasury. Unlike a person receiving welfare benefits, a person who is dismissed is free to seek and obtain other employment in the interim.

The procedures established by Missouri law for its civil service employees are fair and just. Employees are provided advance notice of the reasons prior to dismissal, they have the right to a full evidentiary hearing including the right to call witnesses under oath, the right to be represented by counsel, and the right to a decision by an impartial board, plus the right to full back pay if the suspension or dismissal is determined to be improper. (§§36.380 and 36.390(5), RSMo Cum. Supp. 1975). If the initial decision to dismiss was not justified, the employee is made whole.

Apparently the court below in order to provide respondent another opportunity to demonstrate that his dismissal was not justified is ordering Missouri to follow certain pre-termination procedures and then to give him another chance for an appeal before the Personnel Advisory Board. But, the state should not be penalized when the record affirmatively indicates that respondent at the time of his dismissal was advised of his remedy, knew how to perfect an appeal, but did not.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals. As discussed, the court below failed to follow the plurality opinion of this Court in *Arnett* and failed to follow the teachings of *Bishop*. There is no decision of this Court requiring the pre-termination dismissal procedures now called for by the Eighth Circuit. The issues raised herein will have not only great impact on Missouri but on every other public employer in the country. Consequently, the matter should be determined by this Court—particularly, since there was no majority opinion in *Arnett* and since the makeup of the Court has changed.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1170

Richard Kennedy,
Appellant,

v.

Harold T. Robb, M.D. and Patrick J. Gannon, M.D.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

---

Submitted: September 15, 1976
Filed: December 30, 1976

Before BRIGHT and WEBSTER, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

The appellant before us (hereafter "plaintiff"), discharged from his employment by the State of Missouri, asserted in the District Court that he had been deprived of liberty and property without due process under the Fifth and Fourteenth Amendments. The assertions are made because of the manner in which he was discharged

---

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

from his employment.[1] Upon cross-motions for summary judgment, the District Court held for the defendants. We reverse and remand.

The plaintiff was a nonprobationary employee of the State of Missouri. He had been hired in December of 1968, had served his probationary period, had received thereafter regular promotions, and had ultimately become a Workshop Director at the St. Louis State Hospital Complex. His performance of his duties had been rated consistently satisfactory until May 1, 1975, the date of his eleventh and final service report. In this report, his performance was rated as unsatisfactory. On June 17, he was given a seven page letter from Dr. Gannon, the Superintendent of the St. Louis State Hospital Complex, informing him that he was suspended without pay from such date through June 24, "at which time you are dismissed from employment." The suspension and discharge letter charged plaintiff with discrimination between employees in applying work standards, of harshness to some and leniency to others, of having abused and threatened subordinates, of falsifying his own work records on 37 specific occasions, of failure to comply with Department of Mental Health Operating Regulations, of failure to meet specified deadlines in submitting reports, and, finally, of incompetence in the management of the workshop under his direct charge, all in specific detail.

The letter also told plaintiff that "[y]ou are advised that you may appeal your dismissal to the Missouri Advisory Board providing such appeal is made in writing within 30 days of the effective date of dismissal." No such appeal was perfected, with the result that the Board,

1. Jurisdiction is asserted under 42 U.S.C. §§ 1983 and 1985, as well as 28 U.S.C. §§ 1331, 1343, 1651, 2201, and 2202, "and under the Fifth and Fourteenth Amendments to the Constitution of the United States." Complaint, Paragraph 6.

set up by the State to entertain discharge appeals as part of a comprehensive administrative process, has never considered the case.[2] The Board has authority, we note, in a proper case, to order reinstatement of an employee with back pay.[3] This action was brought directly in the District Court; plaintiff praying for a mandatory injunction ordering his reinstatement. The District Court, as we have noted, upon cross-motions for summary judgment, entered judgment for the defendants. The plaintiff prosecutes this appeal. He denies the specific charges made[4] and in view of the fact that summary judgment was granted for the defendants, we must accept his version of the facts, Fed. R. Civ.P. 56(c); *Arnett* v. *Kennedy*, 416 U.S. 134, 139-140 (1974) (plurality opinion).

The plaintiff presents for review two issues. The first is that he has been deprived of liberty and property without due process, relying on the Fourteenth Amendment to the Constitution of the United States.[5]

There is no doubt that procedural due process, whatever its dimensions, is due an employee who demonstrates

2. The application of the doctrine of exhaustion of state administrative remedies to § 1983 cases has not been argued to us. *See, generally, Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974); *Carpenter* v. *South Dakota*, 536 F.2d 759, 760 n.1 (8th Cir. 1976); *Hartmann* v. *Scott*, 488 F.2d 1215, 1221-23 (8th Cir. 1973); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. Chi. L. Rev. 537 (1974); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201 (1968).

3. *See* note 8, *infra*.

4. "Plaintiff has compiled and collected papers, documents and other memoranda, bearing on and directly refuting the allegations contained in exhibit 2 [the letter of discharge] * * *." Complaint, Paragraph 15.

5. The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

either a liberty or a property interest in the constitutional sense.[6] *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 599 (1972); *Buhr* v. *Buffalo Public School District No. 38*, 509 F.2d 1196, 1199 (8th Cir. 1974). Plaintiff claims both interests. We will first examine the asserted property interest.

With respect to property interest, it is plaintiff's claim that he holds "* * * contractual rights to continuing State employment under formal tenure programs[7] as well as * * * having a cognizable property interest in continued employment on the basis of a *de facto* tenure program fostered by the State and relied upon * * *." Such property interest, if present, being the creation of the state and not the federal government, *Bishop* v. *Wood*, ... U.S. ....., 44 U.S.L.W. 4820, 4821 (June 10, 1976); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577, we look to the statutes of

6. On the general problems here presented, see the comprehensive and historical discussion, Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. Pa. L. Rev. 942 (1976); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196 (1973); Comment, *Fear of Firing: Arnett* v. *Kennedy and the Protection of Federal Career Employees*, 10 Harv. C.R.-C.L. L. Rev. 472 (1975).

7. It is uncontested that plaintiff is a nonprobationary ("regular") employee. *See* note 9, *infra*.

8. V.A.M.S. §§ 36.380 and 36.390 (Supp. 1976) provide:

36.380. *Dismissal of employee-approval for reemployment, when*

An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the director. If the director determines that the statement of reasons for the dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the character or conduct

(Footnote continued on following page)

the state for its creation and extent. The applicable statutes relative to the issues before us will be found in the margin.[8]

8 Footnote Continued—

of the employee, he may, upon request of the employee, approve reemployment under subsection 7 of section 36.240, in any class in which the employee has held regular status. Any regular employee who is dismissed shall have the right to appeal to the board as provided under section 36.390.

36.390. *Rights of appeal—regulations concerning appeals and investigations—summary and recommendations required*

* * *

5. Any regular employee who is dismissed or demoted or suspended for more than three days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion the board shall approve or disapprove such action and in the event of a disapproval the board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal the board shall approve or disapprove such action, and may make any one of the following appropriate orders:

(1) Order the reinstatement of the employee to his former position and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal;

(2) Sustain the dismissal of such employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal;

(3) Except as provided above the board may sustain the dismissal, but may order the director to recognize reem-

(Footnote continued on following page)

The plaintiff, as a "regular employee"[9] of the State was subject to dismissal only "for cause."[10] If dismissed

---

8 Footnote Continued—

ployment rights for the dismissed employees under subsection 7 of section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service. The Regulations of the State Merit system provide as follows:

13.2 *CAUSES FOR SUSPENSION, DEMOTION AND REMOVAL.*

The following are declared to be causes for suspension, demotion, or removal of any employee in the classified service; however, such actions may be based upon causes other than those herein enumerated, namely, that the employee:

(a) Has willfully violated any of the provisions of the "State Merit System Law" or of the rules of the Personnel Advisory Board made in pursuance thereof;

(b) Is incompetent or inefficient in the performance of the duties of his position (specific instances to be charged);

(c) Has been wantonly careless or negligent in the care of the property of the State;

(d) Has been guilty of abusive or improper treatment toward an inmate or patient of any state institution or to a person in custody; provided the acts committed were not necessarily or lawfully committed in self-defense, to protect the lives of others or to prevent the escape of anyone lawfully in custody;

(e) Has some permanent or chronic physical or mental ailment or defect which incapacitates him for the proper performance of the duties of his position;

(f) Has been habitually tardy in reporting for duty or has absented himself frequently from duty during regular working hours;

(g) Has been convicted of a felony, or a misdemeanor involving moral turpitude;

(h) Has been guilty of a scandalous and disgraceful conduct while on or off duty where such conduct tends to bring the state service into public disrepute.

9. A "regular employee" is defined as, "an employee appointed to a position in accordance with [the State Merit System Law] after successfully completing a probationary period." V.A.M.S. § 36.020(12) (Supp. 1976).

10. *See* note 8, *supra*.

he is entitled to a post-termination[11] evidentiary hearing before the Missouri Personnel Advisory Board.[12] After the hearing, the Board will either approve or disapprove the employee's dismissal.[13] If the Board disapproves the dismissal it shall "[o]rder the reinstatement of the employee to his former position and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal."[14]

We are cited to no controlling opinion of the Supreme Court of Missouri ruling upon the herein-cited statutes with respect to the nature of the property rights, if any, created thereby and our own independent research discloses none.[15] We find no ambiguity in the Missouri stat-

---

11. The dismissed employee is required to file his appeal within thirty days after the effective date of dismissal. V.A.M.S. § 36.390 subd. 5 (Supp. 1976).

12. *Id.* The procedural safeguards available to the discharged employee at the post-termination hearing are set forth in greater detail in Merit System Rule 14.3. The discharged employee has "the right to be represented by a duly licensed Attorney." Rule 14.3(a)(2). The Personnel Director or Personnel Advisory Board will issue subpoenas for witnesses or records upon the request of the discharged employee. Rule 14.3(a)(3). The person imposing the disciplinary action on the employee is required to attend the hearing before the Personnel Advisory Board. Rule 14.3(b)(3). Additionally, all witnesses at the hearing must be sworn. Rule 14(b)(6).

13. V.A.M.S. § 36.390 subd. 5 (Supp. 1976).

14. *Id.*

15. The case of *Wolf* v. *Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. 1974) (en banc), although dealing with a collateral point, may be read to support the view that merit system employees in Missouri may be discharged only for cause, indicating thereby that continued employment is a property right. The *Wolf* court stated, in part:

"Civil service employees * * * by reason of the fact that *their tenure is made stable by the civil service laws and can be ended only under certain prescribed conditions*, are not considered to occupy a position analogous to that of public

(Footnote continued on following page)

utes.[16] A "regular employee" may be dismissed only for cause shown.[17] We are of the opinion that under the applicable statutes and regulations, cited *supra*, the plaintiff had a property interest entitling him to procedural due process.

At this point the question presented is what process is "due." *See Greenhill* v. *Bailey*, 519 F.2d 5, 9 (8th Cir. 1975). No fixed "rules" are applicable. Due process has a flexibility determined by time, place, and circumstances. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

We are not without guidance in this area, both in this circuit and in the Supreme Court. As we held in *Wilderman* v. *Nelson*, 467 F.2d 1173, 1175 (8th Cir. 1972), "The Fourteenth Amendment * * * compels a pretermination hearing for state employees holding contractual rights to continuing state employment under formal tenure pro-

---

Footnote Continued—

officers in respect to the question of mitigation of damages simply because of their status as civil service employees."

517 S.W.2d at 143 (quoting 150 A.L.R. 100, 102; emphasis added).

The *Wolf* court also stated:

[Merit System employees] are not public officers. *Their relationship is essentially one of contract. Civil service employees simply have more safeguards built in to protect their tenure in that relationship.*

517 S.W.2d at 143 n.5 (emphasis added).

16. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 439 (1971) (citation omitted).

17. It was the conclusion of six members of the court in *Arnett* v. *Kennedy*, *supra*, that "* * * because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection." *Bishop* v. *Wood*, *supra*, 44 U.S.L.W. at 4821 n.8.

Cf. id.: "In this case [*Bishop*], a holding that as a matter of state law the employee 'held his position at the will and pleasure of the city' necessarily established that he had *no* property interest." (Emphasis in original.)

grams * * *." As for the scope and content of the pretermination hearing, the Supreme Court, while noting that "due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' " states that "the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."[18] "There are," the Court concedes, " 'extraordinary situations' that justify postponing notice and opportunity for a hearing,"[19] but the facts in the case before us disclose nothing of an extraordinary situation. Plaintiff's performance of his duties had been under investigation for a substantial period of time and no emergency is before us.

The case of *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) has been argued to us at length. Although unable to agree on an opinion, it was the holding of the Court that the trial-type evidentiary hearing demanded by the non-probationary federal employee, there before the Court, was not required under the Fifth Amendment. But the Lloyd-La Follette Act[20] under consideration in *Arnett*, unlike the Missouri statute, did provide for an opportunity to file a written answer to the charges made. The *Arnett* Court, however, did not purport to mandate any procedure as essential to the meeting of minimal pretermination due

---

18. *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972) (citation omitted, emphasis in original).

19. *Id.* at 90 (citation omitted). *See, e.g., Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947) (appointment of conservator for federal savings and loan association without prior hearing upheld because of "the delicate nature of the institution and the impossibility of preserving credit during an investigation"); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 556 (1921) (seizure without prior hearing of enemy property during wartime upheld); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908) (seizure and destruction of adulterated food without prior hearing upheld because of danger to public health).

20. 5 U.S.C. § 7501.

process requirements. What it passed on were existing rules, not the formulation of new ones. The decision thus did not indicate what the result would have been had there been no pretermination safeguards whatever.[21] That is our problem.

The several opinions of the Court in *Arnett* have been paralleled in severality by the various circuits in determining the parameters of pretermination due process, all relying on *Arnett*. But since *Arnett* did not purport to decide this issue, we think that dissection of these cases would be fruitless. Each court relies upon its own interpretation of *Arnett*. Guidance, however, may be found in a post-Arnett case, *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), wherein it was held that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the addi-

21. "Although the question of respondent's federal constitutional right to a hearing *at some time*, in connection with a discharge for cause may already have been resolved in respondent's favor in *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Arnett* v. *Kennedy*, *supra*, the tenured employee's right to a *preremoval* hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing *before* removal coupled with a full hearing after removal. See concurring opinion of POWELL, J., in *Arnett* v. *Kennedy*, *supra*, at 164, 170."

Boehning v. *Indiana State Employees Association*, 423 U.S. 6, 7-8 n. (1975) (emphasis in original).

> tional or substitute procedural requirement would entail.[22]

We are thus remitted to the balancing process. The interests of the government in responsible and efficient operation of its processes are clear. The retention of an inefficient or insubordinate employee is harmful not only to the expeditious administration of policy, but is also detrimental to employee morale. On the other hand, we are dealing with the employee's livelihood. Elimination from the payroll may well inflict extreme hardship, possibly, as here, forcing the former employee to reliance upon public aid.[23] Moreover, beyond that, is the factor of human fallibility. Mistake and misinformation are not unknown. Decision makers in discharge cases, as pointed out in *Goss* v. *Lopez*, 419 U.S. 565, 580 (1975),

> frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost * * *.

We read the disparate opinions in *Arnett* to agree substantially that the possibility of unjustifiable discharge is to be minimized in any dismissal process. But at no stage in Missouri's pretermination procedure is there an opportunity for the employee to respond to the charges made to the official responsible for making the termina-

22. *See also Cafeteria and Restaurant Workers Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961) (footnote ours).

23. *See* Powell, J., concurring in part in *Arnett*, *supra*, 416 U.S. at 169: "To be sure, even a temporary interruption of income could constitute a serious loss in many instances;" White, J., concurring in part and dissenting in part in *id.* at 194: "The impact on the employee in being without a job pending a full hearing is likely to be considerable * * *."

tion decision. Here we find a significant omission from the procedures passed upon in *Arnett* where the Court rejected the need for an evidentiary trial-type hearing. The regulations ruled upon in *Arnett* provided that "the employee shall have an opportunity to appear before the official vested with authority to make the removal decision in order to answer the charges made against him."[24]

The need at this stage of proposed dismissal is to minimize the employee's risk of wrongful termination, not a decision on the merits. That will come later, before the Advisory Board, with the full panoply of adversary confrontation. It is squarely at this point that plaintiff makes a formidable assertion, namely that he has a right to have his say before he is fired, particularly since in this situation the "issues of credibility and veracity * * * play a significant role"[25] in the decision reached.

We thus balance the chance of error, mistake, or bias, resulting in the disastrous termination of employment, against the expense, the delay, and the administrative burden of trial with counsel, testimonial presentations, and the right of cross-examination. It is not without significance in this regard that the Court in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 333-34, noted that "[i]n only one case, *Goldberg* v. *Kelly*, 397 U.S., at 266-271, has the Court held that a hearing closely approximating a judicial trial is necessary," and continuing, "More recently, in *Arnett* v. *Kennedy*, *supra*, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, *reasonable time for filing a written response, and*

24. *Arnett*, *supra*, 416 U.S. at 143, *describing*, 5 C.F.R. § 752.02(b) (Rehnquist, J., plurality opinion; footnote omitted).

25. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 325.

an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided." (Emphasis ours.)

The result of the balancing process is our holding that procedural due process requires that the employee before us must be given an opportunity, prior to suspension and discharge, to make a rebuttal to the charges made against him.[26] This, as he argues in his brief, is the minimum which should have been afforded him. Beyond that we do not go. Upon the facts presented we see no substantial or persuasive reason to depart from "the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."[27] We so hold.[28]

Under the view we have taken of the case we do not reach plaintiff's arguments with respect to the asserted deprivation of "liberty" protected by the Fourteenth Amendment.

The remaining problem concerns the matter of remedy. The case is remanded to the District Court for further proceedings. Kennedy on this record did not receive a due process hearing before the administrative officer who made the termination decision. The District Court's order

26. We do not consider, on these facts, the extraordinary situations where summary deprivations are warranted, referred to in *Fuentes*, *supra*, 407 U.S. at 90-93, and in note 19, *supra*.

27. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343.

28. *Cf. Johnson* v. *Mathews*, 539 F.2d 1111, 1120-22 (8th Cir. 1976) wherein we contrasted the need for an evidentiary pretermination hearing in the context there presented with that presented in *Mathews* v. *Eldridge*, *supra*. Also to be distinguished upon the procedures mandated, is the case of *Churchwell* v. *United States*, ... F.2d ..., No. 76-1674 (8th Cir., Nov. 29, 1976) wherein plaintiff was afforded neither a hearing nor a right to appeal in an alleged invasion of liberty case. We ordered a full evidentiary hearing on the merits of her termination.

should be tailored to rectifying this defect in procedure. *Cf. Churchwell* v. *United States*, ... F.2d ....., No. 76-1674 (8th Cir., Nov. 29, 1976). The District Court is directed to fashion an appropriate order which will provide for appellant's reinstatement to his former position, or, if that is unavailable, to a similar or comparable position unless within 30 days of the entry of such order the State of Missouri acting through appellees affords appellant Kennedy an appropriate due process hearing concerning his dismissal before his administrative superior, followed by a right of administrative appeal (*see* note 8) by Kennedy should he feel aggrieved by the final action of his administrative superior.[29]

Reversed and remanded for further proceedings consistent herewith.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

29. We recognize that if Kennedy is entitled to reinstatement, he is also entitled to back pay. That issue cannot be reached until a determination is made administratively whether Kennedy's dismissal should now be set aside. If that be the case, the Missouri statutes, as we have noted in note 8, provide for reinstatement with back pay.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

76-1170

Richard Kennedy,
Appellant,

vs.

Harold T. Robb, M.D., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 21, 1977

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

76-1170

Richard Kennedy,
Appellant,

vs.

Harold T. Robb, M.D., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 24, 1977

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-567 C (3)

RICHARD KENNEDY,
Plaintiff,

vs.

HAROLD T. ROBB, M.D., ET AL.,
Defendants.

ORDER

(Filed February 12, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that this Court's Order and attached Memorandum of January 8, 1976, be and is reinstated; and

IT IS FURTHER ORDERED that the defendant shall have judgment against the plaintiff; and

IT IS FURTHER ORDERED that the plaintiff shall pay costs in this action.

Dated this 12th day of February, 1976.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-567 C (3)

RICHARD KENNEDY,
Plaintiff,

vs.

HAROLD T. ROBB, M.D., ET AL.,
Defendants.

MEMORANDUM

(Filed February 12, 1976)

This matter is before the Court upon the cross-motions for summary judgment of the parties. This Court previously entered summary judgment for the defendants for the reasons stated in an attached Memorandum on January 8, 1976. That judgment was set aside in order that counsel for plaintiff might file a memorandum of law in opposition to defendants' motion. After consideration of the matter, the Court is of the opinion that the post-termination hearing available to the plaintiff under Chapter 36 of the Revised Statutes of Missouri, 1969, is sufficient due process protection within the meaning of *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). For a further elaboration of this principle of law see *Davis* v. *Vandiver*, 494 F.2d 830 (5th Cir., 1974); *Burbaker* v. *Board of Ed., School District 149, Cook Cty., Ill.*, 502 F.2d 973 (7th Cir., 1974); *McFarland* v. *United States*, 517 F.2d 983 (Ct. Cl., 1975); *Morgan* v. *Fletcher*, 518 F.2d 236 (5th Cir., 1975); and *Committee for GI Rights* v. *Callaway*, 518 F.2d 466 (D.C. App., 1975).

Accordingly, summary judgment will be entered for the defendants.

Dated this 12 day of February, 1976.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-567 C (3)

RICHARD KENNEDY,
Plaintiff,

vs.

HAROLD P. ROBB, M.D., ET AL.,
Defendant.

ORDER

(Filed January 8, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the defendants' motion for summary judgment be and is GRANTED; and

IT IS FURTHER ORDERED that the defendants shall have judgment against the plaintiff; and

IT IS FURTHER ORDERED that the plaintiff shall pay costs in this action.

Dated this 8th day of January, 1976.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-567 C (3)

RICHARD KENNEDY,
Plaintiff,

vs.

HAROLD P. ROBB, M.D., ET AL.,
Defendants.

MEMORANDUM

(Filed January 8, 1976)

This matter is before the Court upon the motion of the defendants for summary judgment. The present action was filed by the plaintiff against the defendants pursuant to 42 U.S.C. §1983. The plaintiff's complaint states that he was employed by the Division of Mental Health for the State of Missouri initially on December 3, 1968. The plaintiff continued to be employed by the Division of Mental Health until he was discharged from his employment on June 24, 1975. The plaintiff was advised by a letter delivered to him on June 17, 1975, that he was to be suspended effective on that date.

The plaintiff alleges that his discharge and suspension were made without any prior notice of the nature of the charges against him or an opportunity to be heard in defense of these charges. It is the plaintiff's contention that the lack of opportunity to be heard in his own defense coupled with the statutory powers given to the defendants combined to deprive the plaintiff of his rights, privileges and immunities secured and guaranteed to him by the Constitution. The plaintiff complains that he has

been deprived of life, liberty and property and the equal protection of laws in violation of the Fifth and Fourteenth Amendments since his discharge was based upon "allegations of professional inefficiency, inaptitude, immorality and dishonesty.

An examination of the memoranda filed by the defendants clearly indicates to the Court that the plaintiff was discharged pursuant to the provisions of Chapter 36 of the Revised Statutes of Missouri (1969), which provide for a post-termination appeal hearing. It is also the opinion of the Court that the plaintiff has failed to state a cause of action for the reasons stated in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972); and *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).

Accordingly, summary judgment will be entered for the defendants.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

State of Missouri
Division of Mental Health
ST. LOUIS STATE HOSPITAL COMPLEX
5400 Arsenal Street
St. Louis, Missouri 63139

June 17, 1975

Mr. Richard Kennedy
6438 Arsenal Street
St. Louis, Missouri 63139

Dear Mr. Kennedy:

You are hereby suspended without pay from your duties, beginning on June 17, 1975, and continuing through June 24, 1975, at which time you are dismissed from employment at the St. Louis State Hospital Complex of the Department of Mental Health.

In accordance with instructions from me, a committee has conducted and completed an investigation of the operation of the workshop and the conduct of various state employees who function in the workshop. As a result of that investigation, and other related information, and after careful consideration of the facts and information provided, this suspension and dismissal action is taken in accordance with Rule 13.2, 13.3 and 13.5 of the Missouri Personnel Advisory Board. The reasons for this action are as follows:

1. You have knowingly set up and applied unequal standards that constitute discrimination among the employees under your supervision in the workshop. Specifically, on December 6, 1974 and January 1, 1975, you issued official memoranda to your staff describing in detail the procedures all must comply with in their day to day performance of duties in the workshop . . .

"This is to remind you of my memorandum of December 6, 1974 which stated the following:

> All members of the Work Therapy Staff must tell Pauline when they leave their regular work station, where they are going, how long they expect to be gone and how we can reach them.

In addition if you are going to leave the hospital property for any reason you must have my permission or Miss Seipp's permission in advance. . . ."

Yet despite these instructions to *all* of your staff, you require of four members of the staff—Moehle, Goodhart, Rogers and Nichols—rigid adherence, while openly condoning noncompliance by the other employees of the staff —Carter, Seipp, Taylor, Abramowitz and Cox.

These unequal standards are substantiated in quotes from the authenticated statements of four workshop employees.

The Statement of Elaine Goodhart, quoted in part, provides: ". . . Other employees—Willie Nichols, Minnie Rogers, Norma Moehle and I are constantly watched and looked down upon. Other employees and myself, are checked in at the beginning of the day and out at the end of the day by Helen Seipp, Supervisor (out patient). If on an occasion I am late, I am questioned as to the reason for my tardiness, even if it is less than 5 minutes. But on the other hand, the Foremen—Ann Taylor and Ron Carter, and Jim Cox, can be absent whenever they want, as late as they want, and they are never questioned and never docked for this time. . . .

". . . Norma Moehle and myself bring our lunch from home and sit at our desks to eat. While eating our lunch, we are often disturbed regarding our work by Mr. Kennedy, the Foremen or the Counselors. But on the other hand, Helen Seipp begins her lunch period at 11:00 a.m. and doesn't return until 1:00 p.m. During this time, she eats her lunch and returns to her office where she locks her door and takes a nap on a bed in her office. Norma Moehle and myself have been told by Helen Seipp and Mr. Kennedy, not to disturb Ms. Seipp until she opens her office door, sometime after 1:00 p.m. . . ."

Statements of Norma Moehle, quoted in part, provide: ". . . Mr. Kennedy appointed Helen Seipp, Workshop Supervisor (former in-patient and presently out-patient) to check our time when we come in in the morning, also at noon, and when we leave at the end of the day. We also have to report to his Secretary, Evelyn Marshall (patient), if we leave the office, where we are going, how long we will be gone, and how we can be reached. We must also get permission to leave hospital from Mr. Kennedy or Miss Seipp *for any reason*, even on our lunch period. Although some of us are checked at noon regarding our 1/2 hour lunch period, Helen Seipp, Supr. (out-patient) takes 2 hours every day for lunch (11 to 1). After eating in the cafeteria, she returns to her office which contains a bed for her. She then sleeps until she returns at 1 p.m. She is so heavily medicated, that she falls asleep on the job and at staff meetings. We have been told never to disturb her while she is taking her nap at noon. I used

to get hot water for my coffee in her office at noon, but was told by her to stay out.

Statements of Minnie Rogers, quoted in part, provide: ". . . Another instance I would like to mention is, why does Mr. Kennedy allow Helen Seipp, Supervisor (out-patient), to take a nap every day after lunch? She takes from 11:00 a.m. to 1:00 p.m. off for her lunch and her nap time. During this time we are not to disturb her, not even for business. Mr. Kennedy stated in a meeting it wasn't anybody's business what they did or what he did, for he was the Director of this Program, and they could do as they pleased. I guess that is the reason the Foremen don't have to work in the afternoon when the patients are off from work. They just sit around, laugh and talk, or take a nap by laying their heads on the desk, but he will make it his business to see if the Aides and other Staff are working. . . . Some days his foremen, Ann Taylor (ex-drug patient) and Ron Carter (both 9 month employees) sit all day doing nothing but smoking cigarettes and reading a book. Mr. Kennedy doesn't see that. When brought to his attention, he stated he wasn't aware of this. . . ."

2. You have used abusive language and communicated threats to certain employees of the workshop.

Specifically, in a staff meeting of all workshop employees on March 26, 1975, you yelled, cursed, pounded on a table and pointed out specific employees—Moehle, Nichols and Goodhart. You threatened these employees with terminations if they did not follow your rules. You degraded them by stating they were the most undependable

staff you had ever worked with. You singled out three employees—Moehle, Goodhart and Nichols—and called them troublemakers and stated you would cause their service rating to suffer and that you would make out a service rating every three months.

This unacceptable conduct is substantiated by statements of Elaine Goodhart, Norma Moehle, Minnie Rogers and Willie Nichols quoted in part as follows:

> —Elaine Goodhart—". . . During a recent meeting of the Staff, Willie Nichols and myself were accused by Jim Cox, Foreman, of reporting him to Mr. Haselhorst in a letter we were supposed to have written about him. This was not true, for no letter was ever written. At this point, Mr. Kennedy jumped up from his chair, and started yelling, cursing, pounding his fist on the table and pointing his finger at Norma Moehle, Willie Nichols, and myself, he then stated, in front of all the Staff and a patient, that we were trouble makers, that we didn't work with other staff, and that we were not completing our work."
>
> —Willie Nichols—". . . I was told by Mr. Kennedy and Ms. Seipp that I had better worry about my own job, that what the other Workshop staff did was 'none of our business.' They are the most irresponsible undependable staff I have ever worked with in all my 16 1/2 years of employment, since I was employed 9-22-58. . . .
>
> We were told by Mr. Kennedy if we have any complaints about anything, we were not allowed to take them to *anybody* but him, not even to Miss Gulmi, RN. He said we must first get his permission, and if we did not follow this rule he could have us fired, and probably would. . . ."

> —Norma Moehle—". . . Last summer when I went on my vacation, I locked my desk. When I returned, it was unlocked. Mr. Kennedy had the locksmith open it so he could search through my desk (for no apparent reason). The only things in my desk at the time were my own personal belongings. He told me I should have been fired for locking my desk, and threatened that if ever I locked my desk again, he would have me fired. Since then, he has taken my desk key away from me, although he has had desk keys made for other personnel, and told them to lock their desks when not in use. Mine is open at all times. He also made the statement, 'What in the Hell is so important in your desk that it has to be locked?'
>
> At a recent staff meeting of 12 people, Mr. Kennedy singled out 3 employees, namely, Willie Nichols, Elaine Goodhart and myself, Norma Moehle, and labeled us as trouble makers. He told everyone to look at us so they would know who we were, while he paced up and down shaking his finger in our faces and cursing constantly. He also hollered, threatened and pounded his fist on the table all during this meeting. Elaine Goodhart began crying and became hysterical and after the meeting, broke down hysterically again. I offered to take her to the Clinic to see a doctor, but she was in no condition to leave her desk. I applied ice to her face and head to quiet her down, but her nerves and ours were shattered, and we were ignored by Mr. Kennedy for days.
>
> At this same meeting, Mr. Kennedy said he would see that our Service Ratings would 'suffer', and stated he would make out a Service Rating on all 3 of us every month in the future. Also, at this meeting, when we complained about the absenteeism of Ron Carter and

Ann Taylor, Foremen, Mr. Kennedy told us it was none of our business, and that they could do as they please, and that's exactly what they have been doing ever since. . . ."

3. You have falsified time and attendance records (St. Louis State Hospital Weekly Employee Attendance Report). You have been absent from work and were observed reporting late for work and at the same time you filed your time and attendance report, signed it, indicating that you were on duty for more time than you were actually present, causing you to receive credit for pay purposes, when you were in fact, not in your assigned place of work. These specific dates that you falsified the attendance records, the amounts of work time improperly credited to your account as a result of the falsification follow:

Date	Time Reported To Work	Hours Claimed as Worked on The Signed Weekly Attendance Report	Unworked Time
1-3-75	10:30 a.m.	8	2½ hrs.
1-8-75	9:30 a.m.	8	1½ hrs.
1-9-75	10:00 a.m.	8	2 hrs.
1-10-75	10:30 a.m.	8	2½ hrs.
1-13-75	9:40 a.m.	8	1 hr. 40 min.
1-14-75	10:30 a.m.	2 CT, 6 Work	½ hr.
1-15-75	9:20 a.m.	8	1 hr. 20 min.
1-22-75	2:10 p.m.	5 CT, 3 Work	40 min.
1-23-75	11:30 a.m.	2½ CT, 5½ Work	1 hr.
1-24-75	9:30 a.m.	8	1½ hrs.
1-27-75	10:10 a.m.	8	2 hrs. 10 min.
1-28-75	9:15 a.m.	8	1¼ hrs.
1-29-75	10:35 a.m.	8	2½ hrs.
1-30-75	9:40 a.m.	8	1 hr. 40 min.
2-7-75	Absent	3½ CT, 4½ Work	4½ hrs.
2-13-75	10:45 a.m.	8	2¾ hrs.
2-14-75	10:30 a.m.	8	2½ hrs.

Date	Time Reported To Work	Hours Claimed as Worked on The Signed Weekly Attendance Report	Unworked Time
3-7-75	9:40 a.m.	8	1 hr. 40 min.
3-13-75	Arv. 8:30 a.m.—Dept. 11:45 a.m. Return—3:45 p.m.	8	4 hrs.
3-14-75	9:30 a.m.	8	1½ hrs.
3-17-75	8:15 a.m.	8	¼ hr.
3-18-75	8:15 a.m.	8	¼ hr.
3-20-75	8:15 a.m.	8	¼ hr.
3-26-75	10:00 a.m.	8	2 hrs.
3-27-75	8:40 a.m.	8	40 min.
3-28-75	11:30 a.m.	8	3½ hrs.
4-1-75	12:30 p.m.	8	4 hrs.
4-2-75	8:30 a.m.	8	½ hr.
4-3-75	8:30 a.m.	8	½ hr.
4-4-75	8:15 a.m.	8	¼ hr.
4-17-75	1:00 p.m.	4 hrs. AL, 4 Work	½ hr.
4-22-75	9:30 a.m.	8	1½ hr.
4-23-75	9:30 a.m.	8	1½ hr.
5-9-75	9:00 a.m.	8	1 hr.
5-16-75	11:00 a.m.	8	3 hrs.
5-19-75	8:30 a.m.	8	½ hr.
5-20-75	8:30 a.m.	8	½ hr.

4. You have failed to comply with Personnel Advisory Board Rules and Regulations, Department of Mental Health Operating Regulations and written directives from your supervisor specifically set forth as follows:

EXAMPLE: You failed to comply with Personnel Advisory Board Rule No. 11, by not submitting a timely annual Service Report. On April 11, 1975, a signed statement of Mrs. Norma Moehle reported to the Personnel Officer that her Service Report had not been submitted for the year 73-74, due in July 1974. Further, you had been apprised both verbally and in writ-

ing of this missing Service Report, as late as April 17, 1975, by your supervisor. The Service Report was finally submitted on April 17, 1975, as a result of a directive from your supervisor, some 10 months late.

EXAMPLE: You failed to comply with Department of Mental Health Operating Regulation No. 29, required approval of out-of-state travel for a trip to Chicago, Ill. from Feb. 17, 1975 to Mar. 2, 1975. The Operating Regulation specifies the necessary advanced approval required at the Department of Mental Health level, and even though you were instructed verbally prior to the trip by the Acting Assistant Superintendent, Administration, N. Alan LaConte, to secure the necessary approvals, you failed to do so. The "OK" by the Superintendent of St. Louis State Hospital Complex on the memorandum of February 13, 1975, addressed from Mr. Kennedy to Dr. Gannon concerning the Chicago trip, in no way authorized any exceptions to the prescribed Operating Regulation.

EXAMPLE: On Aug. 14, 1974 you were directed in writing by your supervisor to notify him whenever you were to be away from the workshop during regular working hours for workshop related work as well as sick leave and vacation time. As a result of noncompliance with the directive and continuing unacceptable time and attendance reflected by attendance record you were given a more restrictive written directive on April 18, 1975 in which you were reprimanded about your continuing absences from the Hospital and directed to provide a doctor's statement for each absence of sick leave of one day or longer. You were then absent on sick leave on April 30, 1975, May 1 & 2, 1975, and provided a doctor's statement only after you were again reprimanded for failing to provide the required doctor's statement.

5. You have regularly disregarded deadlines for submission of reports and requests for action, specifically as follows:

EXAMPLE: A memorandum of March 26, 1975, to you, requested submission of an itemized list of travel expenses for a trip you made to Chicago in late February 1975, to be submitted no later than April 2, 1975. After several verbal excuses you finally submitted the required list on May 19, 1975, 47 days late.

EXAMPLE: A memorandum of May 2, 1975, Subject: Time Reports, to you from your supervisor, noted that time and attendance reports for the work therapy departments were a few weeks behind in submission. Two reports for weeks of in the month of April 1975, were actually submitted the last week of May 1975, approximately one month later. Because of this late submission of attendance reports, April supplemental checks for Ann Taylor and Ron Carter could not be released. This was made a matter of record in a memorandum to you on June 13, 1975, by your supervisor and is also contained in a memorandum from payroll clerk to Personnel Officer on May 15, 1975.

6. Your performance of duties as workshop director has been unsatisfactory. This unacceptable performance is specified in a Service Report of May 1, 1975 that contains unsatisfactory ratings in Work Quantity, Attitudes and Habits. The reasons for the unsatisfactory remarks were explained in detail on the Service Report, which was signed by you, and is a part of your official personnel record. These *unsatisfactory* remarks point up the failure of the workshop program under your direction, i.e. the lack of work for patient employees, the misuse of staff, low morale of staff, lack of direction for assigned staff and resultant

confusion therefrom and also your unsatisfactory time and attendance record. All of the above continuing, in spite of verbal and written counseling over a lengthy period of time.

Your unsatisfactory performance is further specified and described in a letter of March 4, 1975, to the Vocational Rehabilitation Division of the Education Department, by your supervisor, Martin Haselhorst, describing your unsatisfactory performance as program director and the disastrous influence you are having on the workshop. On March 13, 1975, the Vocational Rehabilitation Division Unit Advisor, Merrill Sindt, by letter to Dr. Robb, provided notification of withdrawal of support by Vocation Rehabilitation, to the Department of Mental Health and stated in part that ". . . We have carefully reviewed the progress of all phases of the Unit Program and have concluded that the sheltered workshop is not offering patient benefits to justify maintaining the staff. Over the past several months, patients have only had three or three and one half hours work per day. Because of the *inability of the workshop manager* (underscoring supplied) to obtain contract, only a minimal number of patients can be placed in the shop by our Unit or other treatment areas of the hospital. It has reached the point where we can no longer use the assigned staff for matching federal fund purposes. . . ."

You will be paid compensation for any leave accrual which you have credited to your record, effective at the time of your dismissal. You will be paid for days worked in June, plus leave accrual on the June supplemental payroll. If you wish to withdraw your retirement benefits, you should sign and return the enclosed card.

You are advised that you may appeal your dismissal to the Missouri Advisory Board providing such appeal is

made in writing within 30 days of the effective date of dismissal.

Sincerely,

P. Gannon
Patrick J. Gannon, M.D.
Superintendent

DDB:gc

Enclosure: R-4

This will acknowledge that I received a copy of this letter on
Date 6/17/75 Time 1:30 PM

/s/ R. Kennedy
Signature

Witness: /s/ D. D. Bezold
Signature

Supreme Court, U. S.
FILED
MAR 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1183

HAROLD P. ROBB, M.D., Individually and by His Successor in Office, C. DUANE HENSLEY, Ph.D., Director of the Department of Mental Health, and PATRICK J. GANNON, M.D., Individually and by His Successor in Office, SADASHIV D. PARWATIKAR, M.D., Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

INDEX

Additional Reasons for Granting the Writ 2

Conclusion 6

Table of Citations

Eley v. *Morris*, 390 F.Supp. 913 (N.D.Ga. 1975) 2, 3

Jacobs v. *Kunes*, 541 F.2d 222 (9th Cir. 1976), cert. denied No. 76-791 2

Prince v. *Bridges*, 537 F.2d 1269 (4th Cir. 1976) 3

Satterfield v. *Edenton-Chowan Board of Education*, 530 F.2d 567 (4th Cir. 1975) 5

Thurston v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976), cert. pending No. 76-5224 2

Wolf v. *Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo.Banc 1974) 3

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1183

HAROLD P. ROBB, M.D., Individually and by His Successor in Office, C. DUANE HENSLEY, Ph.D., Director of the Department of Mental Health, and PATRICK J. GANNON, M.D., Individually and by His Successor in Office, SADASHIV D. PARWATIKAR, M.D., Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 24(4) and (5) of the Rules of this Court, petitioners respectfully submit the following supplement to their petition for writ of certiorari filed herein on February 26, 1977.

ADDITIONAL REASONS FOR GRANTING THE WRIT

A Conflict Exists Among the Circuit Courts of Appeals As to What Procedures Are Required by the Due Process Clause Before a Public Employer Can Suspend or Dismiss Civil Service System Employees.

Two circuits, the Fifth Circuit and the Eighth Circuit, which have examined the issue, have held that the Due Process Clause of the Fourteenth Amendment requires that there be pre-termination procedures in addition to a full post-termination evidentiary hearing before a civil service system employee can be suspended or dismissed. See *Thurston* v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976), cert. pending No. 76-5224; and *Kennedy* v. *Robb* (this case). In addition, there is a decision of the United States District Court for the Northern District of Georgia, *Eley* v. *Morris*, 390 F.Supp. 913 (N.D.Ga. 1975) which has adopted similar requirements. All three have imposed similar pre-termination procedures which were provided by Congress when it adopted the United States Civil Service System. Each court has held that a post-termination hearing alone is not sufficient to comply with procedural due process as required by the Fourteenth Amendment.

The Ninth Circuit, however, in *Jacobs* v. *Kunes*, 541 F.2d 222 (9th Cir. 1976), cert. denied No. 76-791, February 22, 1977, has reached the exact opposite conclusion. That court upheld the civil service system of Maricopa County, Arizona, provided that there was a right to reinstatement with an award of full back pay if it was subsequently determined that the suspension or dismissal was

unjustified.[1] The merit system involved therein is extremely similar to Missouri's. There are no pre-termination procedures whatsoever. An employee is provided, prior to the dismissal, advance notice of the reasons for the action. Any employee who feels aggrieved by the suspension or dismissal may appeal to a merit system commission and will be afforded a full evidentiary hearing including the right to counsel, the right to present evidence and the right to cross examine the witnesses who testify against him. Any decision of the commission is subject to judicial review. (The specific statutes and rules and regulations involved therein are before this Court and were attached as an appendix to the respondent's brief in opposition to the petition for writ of certiorari.)

On appeal to the Ninth Circuit and in their petition for writ of certiorari, petitioners argued that this system was constitutionally defective because there were no pre-termination procedures which would provide the employee an opportunity to informally rebut the charges prior to the effective date of the suspension or dismissal (petition for writ of certiorari, pp. 5-8). This Court's attention was specifically directed to the *Eley* decision and to the lack of pre-termination procedures such as were present in *Arnett*.

Although the civil service system is different, the decision of the Fourth Circuit Court of Appeals in *Prince* v. *Bridges*, 537 F.2d 1269 (4th Cir. 1976) is also contrary to the decision of the Eighth Circuit. There, a civil service system employee was dismissed and was only provided the opportunity for a post-termination evidentiary hear-

---

1. In Missouri, there is absolutely no doubt that a dismissed employee is entitled to back pay and attorney's fees if the dismissal was improper. *Wolf* v. *Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. Banc 1974).

ing. Under the procedures and statutes involved there, an employee serves at the pleasure of the appointing authority and may be dismissed if, in the discretion of the appointing authority, he believes that such action would be in the best interests of the agency. There are no pre-termination procedures prescribed whatsoever. The employee who is dismissed has the opportunity to appeal to a merit council and will be provided a post-termination evidentiary hearing. The decision of the merit council is advisory only and the appointing authority's decision after consideration of the council's recommendation is considered final.

The Fourth Circuit in holding that the employee's constitutional rights to procedural due process had not been violated stated:

"A constitutional guarantee of procedural due process arises when a public employee is discharged in violation of the procedural rules designed to protect him. In a situation he has a legitimate 'property' interest to protect. See *Arnett* v. *Kennedy, supra.* In the present case, however, the provisions of the merit plan have not been violated and Mrs. Prince has received the protection that the merit plan provides. Thus, *although Mrs. Prince contends that the merit plan itself fails to insure that arbitrary and unjustified terminations can be corrected by the Merit Council, we hold that she has not been deprived of a 'property' interest protected by the fourteenth amendment because she has received all of the protection the merit plan provides.* As recognized by the Supreme Court in *Arnett* v. *Kennedy*: 'Here the property interest which [the discharged employee] had in his employment was itself conditioned by the procedural limitations which accompanied the grant of that interest.' 416 U.S. at 155, 94 S.Ct. at 1645." Emphasis supplied)

Also, in f.n. 2, the Fourth Circuit in interpreting this Court's decision in *Arnett, supra,* indicated that a post-termination hearing is sufficient to provide an employee an opportunity to clear his name. This is in accord with an earlier Fourth Circuit decision. *Satterfield* v. *Edenton-Chowan Board of Education,* 530 F.2d 567 (4th Cir. 1975).

This is precisely the situation here. There was total compliance with the Missouri Merit System. The decision of the Eighth Circuit totally ignores this, however, and expands and enlarges upon respondent's expectations of continued employment which were established by state law and did not exist when he accepted employment. The Fourth Circuit on the other hand refused to expand upon a civil service employee's remedies beyond that provided in the merit system laws and regulations. The rationale of the Fourth Circuit is precisely the rationale adopted by the plurality opinion of this Court in *Arnett*—namely, a public employer in establishing an expectation of continued employment may at the same time prescribe the procedural means by which an employee may be suspended or dismissed and the procedural means by which it will be determined whether the suspension or dismissal was proper.

As a result of the conflict among the circuits, public employers are in a quandary. Those public employers residing in areas covered by the Fourth and Ninth Circuits do not have to provide any pre-termination procedures whatsoever for their employees. This is particularly the case since this Court denied certiorari in the Ninth Circuit case. On the other hand, public employers in areas

covered by the Fifth and Eighth Circuits must not only provide for a full post-termination hearing but must also adopt certain pre-termination procedures. The conflict must be resolved by this Court.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in petitioner's original petition for writ of certiorari, the writ should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Petitioners

RECEIVED
MAY 12 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. A-655 — 76-1183

HAROLD P. ROBB, M.D., individually
and by his successor in office, C. DUANE HENSLEY, Ph.D.,
Director of the Department of Mental Health, and
PATRICK J. GANNON, M.D., individually and by
his successor in office, SADASHIV D. PARWATIKAR, M.D.,
Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

RUPPERT AND SCHLUETER

By _____
FRANCIS L. RUPPERT

111 South Meramec, Suite 420
Clayton, Missouri 63105

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. A-655

HAROLD P. ROBB, M.D., individually
and by his successor in office, C. DUANE HENSLEY, Ph.D.,
Director of the Department of Mental Health, and
PATRICK J. GANNON, M.D., individually and by
his successor in office, SADASHIV D. PARWATIKAR, M.D.,
Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

REASONS FOR DENYING WRIT

THE DECISION BELOW DOES NOT CONFLICT WITH CONTROLLING OPINIONS OF THIS COURT, AND DOES NOT INTERFERE WITH A STATE'S RIGHT UNDER THE TENTH AMENDMENT TO GOVERN ITS OWN EMPLOYER-EMPLOYEE RELATIONSHIPS.

The thrust of Petitioner's Argument here is that because this court granted Certiorari in Quinn v. Muscare, 425 US 560 (May 3, 1976), and then dismissed the writ when the Respondents therein voluntarily amended their own regulations to provide for pretermination notice and right to be heard, those facts reflect a conflict. This reasoning is difficult to grasp, for surely the absence of a decision by this court cannot be construed as conflicting with the decision of the Court of Appeals for the Eighth Circuit in this case.

The case closest to point, and considered by this Court, is Goss v. Lopez, 95 S.Ct. 729 (1975). In that case, this Court held that the Fourteenth Amendment to the United States Constitution provided for a de minimus right to advance notice and opportunity to be heard in those cases where the threatened state action consisted of short-term suspensions from the public educational system. Under the relief fashioned by the

Court of Appeals for the Eighth Circuit, Respondent is to (1) be given an opportunity to examine the investigative file upon which his notice of discharge was based and (2) be permitted to meet with the discharging officer to present his rebuttal to the charges. No provision has been made for calling witnesses; for testimony under oath; for recording or transcribing the proceedings; for the preservation of evidence; or for the presence of counsel, much like the Court's relief specified in Goss, supra.

The Court of Appeals for the Eighth Circuit did not, in effect, declare the Missouri Civil Service System unconstitutional. (Petition for Writ of Certiorari, Page 19). It merely filled in a gap in the Missouri Civil Service System, adding to the existing procedural requirements the requirement that a pre-termination risk-minimizing procedure be followed.

THE DECISION DOES NOT CONFLICT WITH THE HOLDING OF THIS COURT IN ARNETT V. KENNEDY, 416 US 134 (1974) OR BOARD OF REGENTS V. ROTH, 408 US 564 (1972).

Petitioners argue that the decision of the Court of Appeals conflicts with this Court's holdings in Arnett v. Kennedy, 416 US 134 (1974) and Board of Regents v. Roth, 408 US 564 (1972). In Arnett, a plurality of this Court held that Federal Law does not require a trial-type pre-termination hearing, where a post-termination hearing is provided by Statute. A salient distinction between Respondent's case and that decided by the Court in Arnett is that Arnett had, under Federal Law, a thirty day period in which to respond in writing to the charges. Thus, the decision below provides Respondent with exactly the same rights as conferred by Federal Law in Arnett, that is, a minimization of blatant injustices through a "notice-opportunity to respond-decision" procedure.

Petitioners likewise cannot rely on Board of Regents v. Roth, 408 US 564 (1972) or on Bishop v. Wood, ____ US ____ 48 L.Ed. 2d 684 44 USLW 4820 (June 10, 1976). In Roth, no "tenure" right was conferred by New York Statutes and Roth's contract merely lasted from year to year. In Bishop, the Court specifically found that the employment was at the will of the City, with no rights of any kind implied by Statute or State Law. This Court's opinion in Bishop emphasizes the weight to be given to a lower Court's interpretation of State Law. The District Court Judge who decided Respondent's case, (opinion attached hereto) grounds his decision on Federal Law, and it was only the Court of Appeals for the Eighth Circuit which exhaustively examined State Statutes in this determination.

CONCLUSION

This Court should decline to grant Petitioner the Writ of Certiorari, for the reasons stated above. In addition, in both the District Court and in the Court of Appeals for the Eighth Circuit, Respondent raised three issues:

(1) The failure to grant a pre-termination hearing for a "tenured" State employee constituted a denial of due process, and

(2) That failure to grant a pre-termination hearing where Respondent's discharge was based upon allegations of inefficiency, inaptitude, and dishonesty deproved him of a protected liberty interest in due process, and

(3) Petitioners' failure to follow the procedures required by Bulletin No. 116 deprived Respondent of due process under State Law.

The Court of Appeals grounded its decision on Respondent's claim of a "property right", expressly declining to reach the issue of his "liberty right", and declining to meet the issue of the significance of Bulletin No. 116. Thus, at least one issue remains unresolved by the Court below, which will have to be addressed somewhere in the interest of a complete adjudication of this case. Churchwell v. U.S., 545 F2d 58 (8th Cir. 1976).

Respectfully submitted,

RUPPERT AND SCHLUETER

By Francis L. Ruppert
FRANCIS L. RUPPERT

CERTIFICATE OF SERVICE

Two copies of the foregoing were served by placing the same in regular United States Mail to Daniel P. Card, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, this 10 day of May, 1977.

FRANCIS L. RUPPERT

Accordingly, summary judgment will be entered for the defendants.

Dated this 17 day of February, 1976.

H. Kenneth Wangelin
United States District Judge